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IN THE

# Supreme Court of the United States

October Term, 19

No. 184

BENEFICIAL FINANCE CO. OF NORTH JERSEY,

*Petitioner,*

*vs.*

IRWIN RAY, As Trustee under Reorganization Proceedings of ATLAS SEWING CENTERS, INC.,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court for the Southern District of Florida, Miami Division, dated the 14th day of December, 1962, is not reported, but is reproduced at Appendix "A", infra, p. A1, and is further reflected at pages 95 through 99, both inclusive, in the printed Transcript of the Record. The opinion of the Court of Appeals for the Fifth Circuit, dated February 17, 1964, is reported at 328 F. 2d 55, and for the Court's convenience is repro-

duced at Appendix "B", infra, p. A5. The petition for rehearing was denied on the 17th day of March, 1964, reproduced at Appendix "C", infra, p. A9, and the judgment and mandate of the Court was entered on the 17th day of March, 1964.

## JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on the 17th day of February, 1964, and recorded February 17, 1964, a copy thereof being appended to this brief at Appendix "B", infra, p. A7. The opinion of the Court is dated the 17th day of February, 1964 (Appendix "B", infra, p. A5). The petition for Rehearing was timely filed and was denied on March 17th, 1964, and final judgment of the Court and mandate was issued on the 17th day of March, 1964, all shown at the Appendix attached hereto and above referred to.

The jurisdiction of the Supreme Court of the United States is invoked under 11 U.S.C., Sec. 47(c), (30 Stat. 553 as amended) and Title 28 U. S. C., 1254 (1), (62 Stat. 928).

## QUESTIONS PRESENTED

1. Whether the United States District Court for the Southern District of Florida, Miami Division, sitting as a reorganization court, correctly found that the Master Agreement No. 1 dated January 27th, 1961, by and between Beneficial Finance Co. of North Jersey and Atlas Sewing Centers, Inc., and its subsidiaries is an executory contract?

2. Whether the reorganization court, pursuant to the terms and provisions of section 116(1) of Chapter X of the Act of Congress relating to bankruptcy was entitled, upon proper petition and proper notice to interested persons, to reject an improvident executory contract of the debtor in reorganization?

3. Whether the judgment of the United States Court of Appeals for the Fifth Circuit in the instant case correct and is not in conflict with any other decision so as to warrant further review of the case by this Court?

## STATUTES INVOLVED

The applicable statute (Sec. 116, National Bankruptcy Act, 11 U.S.C., Sec. 516, paragraph 1) is printed in the Appendix, infra, p. A10.

## STATEMENT

The debtor, Atlas Sewing Centers, Inc., on June 22nd, 1962, filed in the United States District Court in and for the Southern District of Florida, Miami Division, its voluntary Petition for Reorganization pursuant to the terms and provisions of Chapter X of the Act of Congress relating to bankruptcy (R. 3-21). On the same day the Court issued its injunction (R. 22), approved the voluntary petition and appointed IRWIN RAY Trustee (R. 24-35).

Subsequently an amendment was filed to the original voluntary Petition for Reorganization, requesting that there be included in the proceedings wholly owned sub-

sidiaries, upon which a second injunctive order was entered (R. 54-59).

The Trustee entered into an operational agreement with Brother International Corporation whereby Brother International Corporation agreed to operate the debtor and its subsidiaries, bearing all losses resulting from the operation of the business and paying to the Trustee all profits accruing from the operation of the business (R. 60).

The Trustee in his report to the Court under date of August 14th, 1962, set forth that Beneficial Finance Company was not rendering a proper accounting to the Trustee in respect of consumer paper it held, and he recommended to the Court that he be authorized to travel to New York City to investigate more thoroughly the acts and liabilities of the debtor corporation in respect to the agreement with Beneficial Finance Company, dated January 27th, 1961 (R. 66).

As a result of the investigation made by the Trustee there was filed on September 21st, 1962, Trustee's Petition to Reject Executory Contract by and between the debtor and its subsidiaries and Beneficial Finance Company of North Jersey (R. 70-82). The Trustee's Petition to Reject Executory Contract resulted in the Court's Order Fixing Hearing on the Trustee's petition and directing persons who should receive copies of the order setting hearing and copies of the Trustee's petition (R. 82-87), the Court having jurisdiction by virtue of Section 116(1) of Chapter X of the Act of Congress relating to bankruptcy, 11 U.S.C., Sec. 516(1).

On the date of the hearing Beneficial Finance Company through its previous counsel filed a Motion to Strike before the presiding Judge (R. 94-95). Subsequent to the Trustee's presentation of his evidence in support of his Petition to Reject Executory Contract (Master Agreement No. 1), the Court permitted Beneficial ten (10) days within which to advise the Court whether or not Beneficial desired to rebut the Trustee's evidence (R. 97). This Beneficial failed to do.

After the entry of the order permitting rejection of the executory contract, Irving Trust Company as Agent for numerous participating banks, acting through their attorney, Randolph H. Guthrie, withdrew all opposition to the entry of said order, said withdrawal of opposition being in the form of Petition of Trustee for Authority to Execute Release, with copy of Release, and Order Authorizing Trustee to Execute Release.

In its motion filed in the lower court for the fixing of a stay order pending appeal Beneficial stated the sole issue raised in the appeal is the question of the jurisdiction of the lower court to determine in a summary proceeding that the accounts held by Beneficial Finance Co. of North Jersey were held by virtue of an executory contract when Beneficial claimed that the accounts were owned outright and that the assignments of accounts had been fully and completely executed prior to the bankruptcy proceeding (R. 111).

At the hearing before the lower court on the 8th of November, 1962, in the colloquy between the Court and counsel, it was brought out that Beneficial collected the gross amount of $5,530,039.84 upon which it collected a

commission of $1,404,316.95. In addition, there was charged against the collection of Atlas paper $263,739.43 as legal, accounting and consultant expenses (Sup. R. 46).

The Trustee, to support the allegations contained in his petition, at the hearing of November 8th, 1962, called as a witness Mr. Herbert Kern, former president of Atlas Sewing Centers, Inc. (Sup. R. 56). Mr. Kern testified that Atlas thought turning over consumer accounts of Atlas Sewing Centers, Inc., to Beneficial would place the company in jeopardy and generally that it was a bad move (Sup. R. 61). Mr. Kern further testified as follows: The servicing of Atlas consumer paper by Atlas Sewing Centers, Inc., was the life blood of the debtors in reorganization (Sup. R. 62). The Beneficial agreement was prepared and presented by the attorneys for Irving Trust Company and the Institutions (Sup. R. 66). Many of the Atlas accounts were "flipped-over" by Beneficial so that debtors of Atlas became in fact debtors of Beneficial Finance Company (Sup. R. 70). When the flip-over occurred, not only did Beneficial gain a consumer of its own at the expense of Atlas but also received a collection fee for the payment of the Atlas account (Sup. R. 70). Many outstanding Atlas accounts were settled by Beneficial for fifty cents on the dollar (Sup. R. 71).

Mr. Kern further testified that the cost to Atlas prior to the Beneficial agreement, in respect of the collection of consumer paper, was a little better than twelve percent (12%). Beneficial received from Atlas approximately $20 million of contracts to be collected at a cost to Atlas of twenty-five percent (25%) of the amount ultimately collected by Beneficial. According to Mr. Kern, under the Beneficial agreement (Master Agreement No.

1) Atlas stood to lose approximately $8 million (Sup. R. 82).

Mr. Eugene C. Rosiere was called by the Trustee and testified he was the vice president and general manager of the eastern division of the company (Sup. R. 89). Mr. Rosiere then introduced in evidence Trustee's Exhibit #1 which showed that, prior to the turnover of consumer accounts to Beneficial, Atlas collected 4.2 percent of consumer accounts and Beneficial collected only 2.4 percent of the accounts, graduating down to .8 percent of accounts by Beneficial in June of 1962 (Sup. R. 96).

Miss Charlotte Blackburn, vice-president of collections of Atlas Sewing Centers, Inc., was called as a witness by the Trustee (Sup. R. 103). Miss Blackburn testified that from the Beneficial accounts returned as uncollectible in one month the company was successful in collecting $20,000.00 (Sup. R. 104). She further testified that from $150,000.00 consumer accounts returned to Atlas by Beneficial Finance Company as uncollectible she was successful in collecting $32,000.00 (Sup. R. 106); and further, that Beneficial returned to Atlas as uncollectible paper on which Beneficial had by settlement collected one-half (½) of the face amount (Sup. R. 117).

All of the testimony offered by the Trustee was in support of the Trustee's Petition to Reject Executory Contract, it being the contention of the Trustee that the contract by and between Atlas Sewing Centers, Inc., and Beneficial Finance Co. of North Jersey was improvident and detrimental to the continued operation of Atlas Sewing Centers, Inc.

On December 14, 1962, United States District Judge Honorable Emett C. Choate entered an order shown in the Transcript of Record, pages 95 through 99, both inclusive. A copy of this order is attached to this brief as Appendix "A". In this order, as reflected in the Transcript of Record, on page 98, the Court based its order upon the following statement, and we quote:

> "* * * * it appearing to the Court that the contract by and between the debtors is executory and burdensome to the estate of the debtors, * * * *"

and then followed certain orders directing Irwin Ray, as Trustee, to reject the contracts between the debtors and Beneficial Finance Co. of North Jersey, dated the 27th day of January, 1961; denying the motion to dismiss filed by Beneficial; directing that the Beneficial Finance Co. of North Jersey account to Irwin Ray, as Trustee, for all moneys collected; directing that Beneficial Finance Co. of North Jersey return or turn over to the Trustee all customer ledger cards, contracts, agreements, mortgages, notes and customer paper of any and all description, held presently by Beneficial Finance Co. of North Jersey; and further directing that the Trustee embark upon the collection of these accounts receivable, contracts, agreements, mortgages, notes and customer paper, and upon the collection of any moneys to maintain and keep separate accounts for the receipt of those funds from those contracts.

Notice of appeal was filed on December 20, 1962, which resulted in the entry of the order and decision by the United States Court of Appeals, Fifth Circuit, dated

February 17, 1962, affirming the trial court in a per curiam opinion, a copy of which is attached to this brief as Appendix "B". A copy of the judgment of the United States Court of Appeals, Fifth Circuit, dated February 17, 1961, is attached as Appendix "B". A copy of the order denying the petition for rehearing, dated March 17, 1964, is attached as Appendix "C."

## ARGUMENT

### I.

The United States District Court for the Southern District of Florida, Miami Division, and the United States Court of Appeals for the Fifth Circuit have decided an important federal question in accordance with the principles of law enunciated by this Court in the case of *Cline* v. *Kaplan*, *322* U.S. *97*, *65* S. Ct. *155*, *89* L. Ed. *97*.

We respectfully contend that Mr. Ward, the attorney for the petitioner, Beneficial Finance Co. of North Jersey, has failed completely to understand the decisions handed down by both the District Court and the United States Court of Appeals with reference to the instant case. Not only has Mr. Ward failed to grasp those decisions, but he has propounded his lack of understanding still further by basing his reasons for granting the writ upon an *alleged* conflict with a decision this Court made in the case of *Cline* v. *Kaplan*, supra, which we submit does not conflict, but completely supports the District Court and the United States Court of Appeals in the instant case.

It is respectively tendered that the following is what this Court said in *Cline* v. *Kaplan*, supra, and nothing more:

"A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 481, 60 S. Ct. 628, 629, 84 L. Ed. 876. If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto'. Gaibraith v. Vallely, 256 U. S. 46, 50, 41 S. Ct. 415, 416, 65 L. Ed. 823; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770. But the mere assertion of an adverse claim does not oust a court of bankruptcy of its jurisdiction. Harrison v. Chamberlin, 271 U. S. 191, 194, 46 S. Ct. 467, 468, 70 L. Ed. 897. It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 26, 22 S. Ct. 293, 296, 46 L. Ed. 413. Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankrupcy court. MacDonald v. Plymouth County Trust Co., 286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093."

Thus it can be seen that this Honorable Court has laid the "guide lines" and outlined the "ground rules" for a bankruptcy court when the question of whether a bankruptcy court has summary rights is raised. The record in the instant case shows that this Court's "guide lines" and "ground rules" have been followed completely and absolutely without the slightest deviation.

The United States District Court for the Southern District of Florida, Miami Division, the Honorable Emett C. Choate presiding, determined the question of summary jurisdiction and held that the Master Agreement No. 1 between the petitioner and the respondent's debtor is purely *executory*. On the basis of these findings the District Court properly held that it had summary jurisdiction based on the United States Statutes, Section 116 of the National Bankruptcy Act, 11 U.S.C., Sections 511-521, paragraph 1, which grants authority as follows:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the Court—
>
> (1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such contracts and to such other parties in interest as the judge may designate."

The United States Court of Appeals for the Fifth Circuit in a per curiam decision in the instant case properly held that the trial court did not err in entering a summary turnover order. Referring to the executory

contracts (Master Agreement No. 1) they said "A reading of the contracts under which Beneficial obtained possession of the property makes it plain that it had no adverse claim of title to the contracts that was more than colorable". The Court of Appeals then referred to a statement they made in *B. F. Avery and Sons Co. v. Davis*, *192* F. 2d *255*, (5th Cir. 1951) and quoted with approval in *Spach, Trustee* v. *Fisher*, *310* F. 2d *328*, *330* (5th Cir. 1962):

> "Where a controversy arises as to whether there is such an adverse claim, the rule is that the referee can summarily enquire into it, and if it clearly appears that possession was in or for the bankrupt, and the adverse claim or right is only colorable, he may make a judgment accordingly; but if there be a possession before bankruptcy that was really adverse and asserted in good faith the referee may not adjudge its merits, but the trustee must seek relief by a plenary suit."

The instant case follows the *Avery* statement completely. Possession of the sales contract was "in or for the bankrupt" because the Master Agreement No. 1 between the petitioner and respondent's debtor was merely *executory*. Therefore, the petitioner's adverse claim or right was only colorable. Thus the proper summary jurisdiction was found accordingly and there is absolutely no conflict with this Court's decision in *Cline* v. *Kaplan*, supra. The facts were properly determined by the District Court, Judge Choate presiding, when he held that the Master Agreement No. 1 was executory and he therefore properly assumed summary jurisdiction as authorized in the National Bankruptcy Act, Section 116, supra.

The United States Court of Appeals for the Fifth Circuit said that the petitioner here was "an agent only for collection of the contracts". We fail to see why this statement disturbs the petitioner. Since the Master Agreement No. 1 was properly found to be *executory*, the United States Court of Appeals for the Fifth Circuit merely referred to the petitioner in his proper capacity, which was "agent only for collection of the contracts". We are certain the petitioner would not prefer to be labeled a "*converter*" of the contracts.

It is respectfully submited that approximately $20,000,000.00 in sales contracts were transferred to the petitioner for collection. The respondent's debtor received nothing for these sales contracts upon transfer. As some of the sales contracts were collected, the respondent's debtor was credited with 75% of the collections. However, the petitioner later returned $6,029,836.32 worth of sales contracts to the respondent's debtor which were charged off as uncollectible. If there had been a completed contract (Master Agreement No. 1), we submit Beneficial would not have returned these contracts to Atlas. Therefore the very *intent* of the parties was that Beneficial would act as "agent only for the collection" of the sales contracts and share only in the *proceeds* of the agency, which was 25% of whatever collections they could make on these accounts. The record shows Beneficial collected commission of approximately $1,500,000.00 in this agency relationship.

In order to arrive at a proper conclusion and answer to this question all of the attendant circumstances surrounding the transaction by and between the parties to the agreement must be examined.

Master Agreement No. 1 is set forth in the Supplemental Record (Sup. R. 2-11). The agreement is directed to Beneficial Finance Co. of North Jersey and states in material part as follows:

> "We desire to sell you or to such one or more of your affiliated corporations or associated companies as you may designate, for the purposes agreed upon, all of our notes, chattel mortgages, conditional sale agreements, and other obligations arising out of the sale of personal property (all herein called 'notes')." (Sup. R. 2)

With respect to the *unascertained* purchase price to be paid by Beneficial Finance Co. Master Agreement No. 1 states as follows:

> "Purchase Price of Notes. The amount which you will pay for the assignment of any such note shall be 75% of the actual collections on such note, giving effect of course, in determining such amount, to any refund or credit of the time price differential, finance charge or the like." (Sup. R. 3)

Another part of the agreement is as follows:

> "Reassignment. In the event you, in your sole discretion, determine that any note assigned pursuant to this agreement is uncollectible, or there is a lapse of six months from the date of the last collection made by you or the obligor on such note alleges that the note has been paid in

full or that the personal property covered thereby has been returned, you may reassign and deliver such note without representation, without warranty and without recourse, to such person as shall be designated by Irving Trust Company as said Agent and you shall be under no obligation to make any further collections with respect to such notes." (Sup. R. 5-6)

It is necessary additionally to consider Agreement No. 1 between the Majority Holders and Atlas Sewing Centers, Inc., and subsidiaries, dated January 27th, 1961 (Appendix "E", infra, p. A11). Said agreement states in part:

"2. We (Atlas) hereby agree and confirm that any and all assignments of notes made pursuant to the Master Agreement shall be deemed to be and shall be assignments for the purpose of securing payment of the Institution Indebtedness and certain obligations of the undersigned as set forth in and contemplated by said Agreement made as of November 9, 1960, all as if such assignments contained express provisions to such effect, subject to the rights of Beneficial under the Master Agreement.

"3. You and we hereby confirm that the Master Agreement constitutes an agreement for servicing the collection of the notes by Beneficial and a security device for the benefit of the Institutions and certain other creditors of the undersigned as aforesaid supplementing the provisions of aforesaid Agreement made as of No-

vember 9, 1960, and all assignments heretofore executed and delivered by the undersigned for such purpose, and, notwithstanding anything herein or in the Master Agreement to the contrary, *does not constitute a loan by, or other disposition of the notes to, Beneficial.* We will make no changes in the Master Agreement without first consulting you and obtaining your prior written consent." (Appendix "E", infra, p. A12, A13) (Emphasis ours.)

And further:

"5. (a) This agreement, the Master Agreement and Agreement No. 1 dated January 27, 1961 between the Majority Holders and Beneficial shall constitute a supplement within the terms and provisions of the Agreement made as of November 9, 1960, with Beneficial being hereby substituted for the Custodian with respect to the notes delivered to it and also for the banks of deposit." (Appendix "E", infra, p. A13)

To further enlighten the Court with respect to the intention of the parties, Agreement No. 1 between Beneficial Finance Co. of North Jersey and Majority Holders, dated January 27, 1961, (Appendix "F", infra, p. A18) must be examined. In said agreement it is stated to Beneficial by Majority Holders:

"No disposition shall be made by you of any property repossessed or returned except with the consent of the Majority Holders or their agent." (Appendix "F", infra, p. A19)

Petitioner incorrectly claims that Master Agreement No. 1, despite the attendant circumstances, and despite the terms of the agreement itself, constituted an absolute sale to it by Atlas Sewing Centers, Inc., and subsidiaries of all consumer paper held by Atlas on the date of the agreement, i.e., January 27th, 1961.

It is respectfully urged upon this Court that the true intent of Master Agreement No. 1 was well established by the Majority Holders for whose benefit admittedly the agreement was entered into, when it was stated supra in Agreement No. 1 between the Majority Holders and Atlas Sewing Centers, Inc., and subsidiaries that "the Master Agreement * * * constitutes * * * a *security device* for the benefit of the Institutions * * *." (Emphasis ours.)

It is submitted that the axis agreement by and between Beneficial Finance Co. of North Jersey and the Majority Holders contributed more than any other single given factor to the present financial difficulties of the debtor in reorganization, Atlas Sewing Centers, Inc., and subsidiaries.

Not only does the Trustee have an obligation but under the circumstances the Trustee has a duty to the Court, creditors, bondholders and stockholders of the debtor in reorganization to set aside Master Agreement No. 1 by and between the debtor and subsidiaries and Beneficial Finance Co. of North Jersey. It might be pointed out that at this time in the proceedings there are the interests of thousands of stockholders (the company being listed on the American Exchange) and creditors to be considered.

This Court in *Hatch* v. *Standard Oil Co.*, 100 U. S. 130, 25 L. Ed. 554 clearly stated when, and under what circumstances, an agreement is merely executory, when it said:

> "When the agreement for sale is of a thing not specified, or for an article not manufactured, or of a certain quantity of goods in general without any identification of them or an appropriation of the same to the contract, or when something remains to be done to put the goods into a deliverable state, or to *ascertain the price to be paid by the buyer*, the contract is merely an executory agreement, unless it contains words warranting a different construction, *or there be something in the subject-matter or the circumstances to indicate a different intention.*" (Emphasis ours.)

Again in *Farrington* v. *Tenn.* 95 U. S. 683, 24 L. Ed. 558, this Court states:

> "Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. * * * An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not be done by one or both the parties. * * * "

Let us apply the principles pronounced by this Court with respect to executory contracts to the Master Agreement No. 1. Master Agreement No. 1 uses such phraseology as:

"We desire to sell * * * " (Sup. R. 2):

"The amount which you will pay for the assignment of any such note shall be 75% of the actual collections on such note * * *" (Sup. R. 3); and "* * * we will pay you $10.00 for handling the repossession and if the obligor resides more than ten miles from your said office, we will pay you $20.00." (Sup. R. 4)

Certainly such language and the attendant circumstances show the *true intent* of the parties and the *executory* nature of Master Agreement No. 1. There certainly is no true sale within the legal meaning of the word sale. The "price" to be paid by Beneficial for the assignment of consumer contracts to Beneficial under the agreement *cannot be ascertained until the entire agreement has been fulfilled and completed.* The "price" which Beneficial was to have paid under the terms of the agreement is 75% of whatever collections *might* be made of consumer installment contracts by Beneficial. The *indefiniteness* of the Master Agreement No. 1 must defeat the petitioner's claim.

In addition, obligations are imposed upon the debtors with respect to repossession of sewing machines and servicing of the machines. This, it is submitted, is a continuing obligation on the part of the debtor and its subsidiaries, which negates the theory of finality in the contract.

"A contract is executed where everything that was to be done is done, and nothing remains to be done." *Farrington v. Tenn.*, supra.

Can we apply this principal to Master Agreement No 1? The answer most obviously is NO, because here we find everything undone, indefinite and unascertained.

(See also *Collier on Bankruptcy*, 14th Edition, Volume 6, paragraph 2.11, page 386, "Definition of 'Executory Contract', § 106(7)".)

This agreement (Master Agreement No. 1) cannot constitute an executed contract until the last installment of consumer accounts assigned to Beneficial is collected and commission paid, or until the last servicing of consumer commodity is made by Atlas Sewing Centers, Inc., or subsidiaries, or until the last repossession of personal property covered by the consumer contracts is made. Then and only then can this agreement be considered as an executed contract.

Under the circumstances of the analysis of Master Agreement No. 1, it is hardly necessary to examine the attendant circumstances to determine the intent of the parties as reflected by the Majority Holders Agreement No. 1 with the debtors in reorganization and the Majority Holders Agreement No. 1 with Beneficial Finance Co. of North Jersey. However, in passing, to enlighten the Court in its determination as to the executory nature of Master Agreement No. 1, it is shown that this contract (Master Agreement No. 1) was *not* considered to be an executed contract of sale. By the confession of the parties to the various agreements it was designated a "*security device*" (Majority Holders Agreement No. 1 with Atlas Sewing Centers, Inc., and subsidiaries) (Appellant's Brief, Appendix 1).

It is respectfully submitted upon the argument presented and upon the record that this Court must find that Master Agreement No. 1 is *executory* in nature for the reasons herein stated, and remained so at the time of the Trustee's petition to the United States District Court for the Southern District of Florida, Miami Division, to reject the executory contract pursuant to the terms of Chapter X of the Act of Congress relating to bankruptcy. Section 116(1).

II.

The United States District Court for the Southern District of Florida and the United States Court of Appeals for the Fifth Circuit have decided an important federal question not only in accordance with the principles of law enunciated by this Court in the case of *Cline* v. *Kaplan* *322* U. S. *97*, *65* S. Ct. *155*, *89* L. Ed. *97*, but in accordance with the United States Courts of Appeals for the Ninth and Second Circuits in the cases of *Sulmeyer* v. *Pfohlman*, *329* F. 2d *915* (9th Cir. 1964); and *Cherno, Trustee In Bankruptcy* v. *Engine Air Service, Inc.*, *330* F. 2d *191* (2nd Cir., 1964).

It is respectfully submitted to this Court that the alleged conflicts in decisions cited by the petitioner in his brief (pgs. 21-24) *are not conflicts*, but rather these decisions are in accordance with the decisions in the instant case.

The petitioner quotes (petitioner's brief, page 22) *Sulmeyer* v. *Pfohlman*, supra, at pg. 917 as follows:

"One or the other of two elements must be present in order for the bankruptcy court to have summary jurisdiction to determine interests in property. Either the bankrupt must have had actual or constructive possession of the property at the time of the filing, or the claim asserted against the property must not have been 'substantial' and 'adverse'. Martoff v. Elliott, Trustee, 9 Cir., 326 F. 2d 204."

Here we are forced to once again answer the petitioner's incorrect claim of conflict in decisions. With reference to the two elements listed above necessary for a bankruptcy court to have summary jurisdiction:

1. The respondent's debtor in the instant case had actual or constructive possession of the property at the time of filing because the Master Agreement No. 1 was merely executory.

2. The petitioner's alleged claim was *not* substantial or adverse, but merely *colorable* because the Master Agreement No. 1 was *executory*.

In the *Cherno* case, supra, the petitioner once again tries to fit a round peg into a square hole. *Cherno* involves a security deposit to a landlord, a lease and a question of a refund of the deposit. That is *not* the instant case, nor on the basis of the facts is there any conflict in decisions.

Therefore, both the United States District Court for the Southern District of Florida, Miami Division, and the United States Court of Appeals for the Fifth Circuit

were correct in their decisions in the instant case and no conflict in decisions exists as alleged by the petitioner.

## III.

The United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Florida, Miami Division, have decided the instant case in the accepted and usual course of jurisdictional proceedings as approved and sanctioned by this Court.

The petitioner in his brief at page 26 quotes as follows:

> "The clearest instance of a power coupled with an interest is where, as a part of the arrangement with his principal, the agent receives title to all or a part of the subject matter of the agency, as distinguished from title to all or a part of the *proceeds of the agency*." (Emphasis ours.)

We respectfully submit that the petitioner received title to only 25% of the "proceeds of the agency" (after collection) which amounted to approximately $1,500,000.00 as commissions for collection of a portion of the accounts. This was truly the intent of the parties as evidenced by the petitioner's return to Atlas of $6,029,836.32 worth of contracts as uncollectible. If the petitioner had title to these contracts or thought it was vested with title there would have been no logical reason to return these contracts to Atlas. The petitioner's actions defeat his claims.

Petitioner claims (petitioner's brief, pg. 26) that

*Dore* v. *Cowlitz Valley Bank*, 191 Wash. 429, 71 P. 2d 555 (1937), is "nearly in point" with the instant case. We submit that the petitioner once again is in error, because in the *Dore* case there was a note and a debt and the pledged corporate stock was used as collateral security for the note. That is not this case. If the petitioner cannot distinguish these facts from the facts in the instant case, *where we merely have an agent for the collection of some accounts*, then the petitioner has missed the point entirely.

## CONCLUSION

The Petition for the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

J. EDWARD WORTON